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U.S. Citizenship
and Immigration
Services

FILE: EAC 02 054 53423 Office: CALIFORNIA SERVICE CENTER Date: **JAN 27 2004**

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the petition's priority date is December 8, 1997. The beneficiary's salary as stated on the labor certification is \$18.89 per hour which equates to \$39,291.20 per annum.

Counsel submitted copies of the petitioner's Internal Revenue Service (IRS) Forms 1120S for the years from 1997 through 2000. The IRS Forms show an ordinary income of -\$5,374 for 1997; \$3,530 for 1998; \$11,516 for 1999; and \$13,315 for 2000. Because no schedules were provided with the tax returns, the director requested additional evidence from the petitioner to establish its ability to pay the proffered wages. In response to the director's notice, the petitioner submitted its 1997 tax return with all schedules and attachments reflecting negative net current assets, as well as its accountant's letter that the petitioner's promissory notes would be paid off soon and would improve the petitioner's situation.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel re-submits previously submitted copies of the petitioner's tax returns for 1997 through 2000 without schedules or attachments. Therefore, only excerpted copies of the petitioner's IRS Forms 1120S for 1998 through 2000 are in the record of proceeding. Additionally, counsel re-submitted the petitioner's accountant's letter that states that notes payable as of December 31, 1997 totaling \$92,762 will be paid off as of July 2, 2002, and the petitioner's cash flow will be greatly improved.

Counsel's assertions are not persuasive. The petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. § 204.5(g)(2). In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or

other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Counsel asserts in his brief that "[a]s a newly established business whose gross sales, income, and balance sheets have increased substantially since the business's inception in 1996, the petitioner's continued increase of business and profit are reasonable expectations; and pursuant to the Matter of Sonegawa precedent case, this visa should be approved."

Counsel's reliance upon the holding in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is misplaced. *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner in *Sonegawa* was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Counsel has provided no evidence which establishes that unusual circumstances existed in this case which parallel those in *Sonegawa*, nor has it been established that 1997 was an uncharacteristically unprofitable year for the petitioner.

The petitioner's IRS Form 1120 for calendar year 1997 shows an ordinary income of -\$5,374. The petitioner could not pay a proffered wage of \$34,379.80 a year out of this income. Additionally, the petitioner's current liabilities outweigh its current assets.¹ Thus, the petitioner could not pay the proffered wage out of its net current assets.

In addition, the petitioner's ordinary income figures for the years 1998 through 2000 continue to show an inability to pay the wage offered. Since the petitioner did not provide its schedules or attachments, no further analysis may be made with respect to the petitioner's net current assets for those years.

Additionally, the regulations clearly establish a continuing ability to pay the proffered wages. The accountant's assertion that paying off a promissory note will improve the petitioner's financial situation is speculative and contributes little to the possibility of the petitioner's ability to pay the proffered wages. Regardless of what evidence the petitioner might be able to adduce concerning a future ability to pay the proffered wages, it has not been able to prove its ability to pay the proffered wages in past years. Thus, it cannot demonstrate a continuing ability to pay the proffered wage.

¹ Net current assets are assets that can reasonably be expected to be converted to cash or a cash equivalent within the year less any financial encumbrances on the assets. Thus, if the petitioner could show net current assets that are greater than the proffered wage, it could evidence the ability to pay.

Accordingly, after a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.